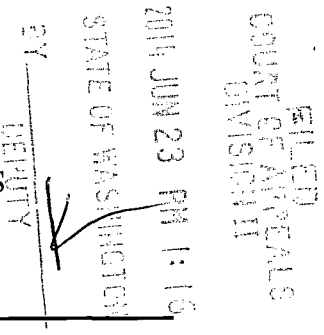
No. 45640-1-II

WASHINGTON STATE COURT OF APPEALS
DIVISION TWO



TONYA HEDGES, *Plaintiff-Respondent*

v.

AMERICAN FAMILY INSURANCE, *Defendant-Appellant*

RESPONDENT'S BRIEF

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INTRODUCTION

Plaintiff-Respondent Tonya Hedges (hereinafter "Tonya Hedges") agrees with the "Introduction" set forth in the brief of Defendant-Appellant American Family (hereinafter "American Family"), except to the extent that American Family refers to the insurance provision at issue as an "anti-stacking provision in the underinsured motorist endorsement." (Appellant's Brief, p. 1, para. 3). As will be discussed further *infra*, that choice of labeling by American Family presumptuously assumes a meaning for the provision that is not supplied by the provision's actual words or title.

ASSIGNMENTS OF ERROR

Tonya Hedges disputes American Family's three assignments of error. The trial court did not err in its decisions below.

STATEMENT OF THE CASE

A detailed recitation of the specific facts that the trial court based its rulings on are set forth in the Stipulated Facts (CP 20), and the Supplement to Stipulated Facts. (CP 35.) Responding specifically to portions of the "Statement of the Case" set forth in Appellant's Brief, Sections A.1. and A.2. are accurate insofar as they go. A summary of the egregious injuries and extensive economic and non-economic damages

suffered by Tonya Hedges as a result of the negligence of Arthur Beagle that caused the automobile collision of October 27, 2010, is set forth in the "Brief in Support of Plaintiff's Motion for Summary Judgment re Defendant's Obligation to Pay UIM Benefits" (CP 143, 144-45) and in the Declaration of Tonya Hedges (CP 32, 32-33.) Because it is pertinent to the application of the insurance provision at issue, it is also important to stress that at the time of the automobile collision, Tonya Hedges was driving her mother's car, a car that Tonya did not own. (CP 20, para. 1.)

Section A.3. of the "Statement of the Case" from Appellant's Brief accurately notes that American Family denied Tonya Hedges' claim for underinsured motorist benefits, but again mischaracterizes the insurance provision at issue as an "anti-stacking provision".[1]

Section B.1. of the "Statement of the Case" from Appellant's Brief is accurate except for two concerns—first, American Family's continued mislabeling of the provision at issue as an anti-stacking provision, and second, the final sentence thereof, which contends that the trial court ruled

[1] The insurance provision at issue is not labeled with the words "anti-stacking" in the policy itself, nor are those words to be found within the clause at issue. It thus starts out as just an insurance policy endorsement provision that is found under the title "General Conditions"—its meaning must be gleaned from what it says, and not presumed from the label any given party wants to paint it with in the briefs they file and arguments they make.

for Plaintiff "on grounds different from anything Plaintiff had argued in support of her motion."[2]

Sections B.2., B.3., and B.4. of the "Statement of the Case" from Appellant's Brief are accurate.

Essentially, the parties agree that the decision of this case rests upon the appropriateness of the trial court's conclusions regarding the following "GENERAL CONDITIONS" provision of the Washington UIM endorsement in Tonya Hedges' American Family policy:

> F. ADDITIONAL GENERAL CONDITIONS
>
> 1. Other Insurance
>
> ***
>
> b. Other *Liability Coverage* From Other Sources
>
> If there is other similar insurance for a loss covered by this endorsement, **we** will pay **our** share according to this policy's proportion of the total of all *liability limits*. But any insurance provided under this endorsement for an **insured person** while **occupying** a vehicle **you** do not own, including any vehicle while used as a temporary substitute for **your insured car**, is excess over any other similar insurance.
>
> Any recovery for damages under *all such policies or provisions of coverage* may equal but not exceed the *highest applicable limit* for any one vehicle under *any*

[2] The latter is not correct. For example, Plaintiff Tonya Hedges argued in her two briefs submitted to the trial court that the provision at issue is ambiguous, and the court so found (CP 63, 67-70) ("The policy language in this case is ambiguous"). The court went on to construe the language at issue in favor of the insured (*Id.* at 68-70), consistent with what Judge Robert Lewis opined was a reasonable interpretation of Section F.1.b. after "reviewing the entire policy on multiple occasions."

insurance providing coverage on either a primary or excess basis.

(CP 54) (**bold**[3] in original; *italics* added for emphasis).

For simplicity and consistency sake, this provision, the provision in the policy entitled "Other Liability Coverage From Other Sources" which is contained in Section F.1.b. of the UIM endorsement to the policy and at issue here, will be hereinafter referred to simply as "Section F.1.b."

SUMMARY OF ARGUMENT

The "General Conditions" insurance provision at issue in this case, if not read to clearly extend UIM coverage on the facts before this court, is ambiguous. Exclusionary clauses are to be strictly construed against the insurer, and where there is room for two constructions, one favorable to the insured and one favorable to the insurer, courts must adopt the construction most favorable to the insured. The trial court's rulings that, as a matter of law, American Family should not have denied UIM coverage to Tonya Hedges, and that she is entitled to her attorney fees and costs for having to enforce her right to coverage, should be affirmed.

[3] The policy expressly defines all words in bold type that are used throughout the policy.

ARGUMENT

I. Whether American Family could draft an enforceable anti-external stacking provision in the policy was never at issue.

UIM coverage is governed by RCW 48.22.030. Unless an insured expressly rejects UIM coverage, Washington insurers must include UIM coverage in every automobile liability policy. RCW 48.22.030(2);(4). "[RCW 48.22.030] is liberally construed in order to provide broad protection against financially irresponsible motorists." *McIllwain v. State Farm Mut. Auto. Ins. Co.*, 133 Wn.App. 439, 445, 136 P.3d 135 (Div. 3 2006), *rev. den.*, 159 Wn.2d 1020, 157 P.3d 404 (2007).

Despite this broad protection of Washington insureds, American Family in Appellant's Brief spends much time and effort justifying anti-external stacking provisions in Washington insurance policies (Appellant's Brief, at 12-15). Whether insurers are allowed to draft such provisions into Washington insurance policies is not, and never was, at issue. Insurers are indeed allowed to draft such provisions. RCW 48.22.030(6); *Vadheim v. Continental Ins. Co.*, 107 Wn.2d 836, 844, 734 P.2d 17 (1987). But, such provisions are only valid "if they are unambiguous and follow the provisions of the UIM statute." *Id.*, 107 Wn.2d at 844. The legislature has also allowed insurers to provide more favorable coverage to an insured

than what is statutorily prescribed. RCW 48.18.130(2) ("the commissioner may... approve any provision which is in his or her opinion more favorable to the insured than the standard provision or optional standard provision otherwise required."). Thus, concluding that American Family is allowed to draft an anti-external stacking provision into the policy does not necessarily yield the conclusion that American Family succeeded in creating an anti-external stacking provision in its UIM endorsement.

II. The determination of this case depends on the interpretation of the provision in Section F.1.b. entitled "Other Liability Coverage From Other Sources"—whether that provision should be construed to be an anti-external stacking provision, and if so, whether it precludes Tonya Hedges from receiving UIM benefits under the facts of this case.

After quoting statutes, referencing case law, and expressing in its brief its own intended meaning of Section F.1.b., American Family summarily concludes that Section F.1.b. is a UIM "anti-external stacking provision" even though it is entitled "Other Liability Coverage From Other Sources". (Appellant's Brief 14.) But a provision entitled "Other Liability Coverage From Other Sources" that specifically references "liability limits" cannot so quickly be called an "anti-external-stacking provision" applicable to UIM coverage.

In resolving insurance disputes, the unexpressed subjective intent of a party is irrelevant. *Lynott v. Nat'l Union Fire Ins. Co.*, 109 Wn.2d

338, 340, 738 P.2d 251 (1987). The court will admit extrinsic evidence only to aid in the interpretation of the words employed, not to show intention independent of the instrument. *Spratt v. Crusader Ins. Co.*, 109 Wn.App. 944, 949, 37 P.3d 1269 (2002). The court expressed the reasoning for this rule seventy years ago:

> It is the duty of the court to declare the meaning of *what is written and not what was intended to be written.*

J.W. Seavey Hop Corp. v. Pollock, 20 Wn.2d 337, 349, 146 P.2d 310 (1944) (emphasis added). The court reaffirmed and clarified the rule more recently:

> The principle is quite simple. Unilateral or subjective purposes and intentions about the meanings of what is written do not constitute evidence of the parties' intentions. '*The relevant intention of a party is that manifested by him rather than any different undisclosed intention.*'

Lynott, 123 Wn.2d at 684 (emphasis added) (internal citations omitted) (quoting Rest. (Second) of Contracts §212, cmt. a (1965).

Furthermore, in interpreting an insurance policy courts take a "common sense approach" and do not read the policy as it would be read by a "learned judge or scholar." *Blackburn v. Safeco Ins. Co.*, 115 Wn.2d 82, 92, 794 P.2d 1259 (1990); *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 881, 784 P.2d 507 (1990). Our state Supreme Court has noted:

> [T]he proper inquiry is not whether a learned judge or scholar can,

> with study, comprehend the meaning of an insurance contract, but whether the insurance policy contract would be meaningful to the layman who at his peril may be legally bound or held to understand the nature and extent of its coverage. The language of insurance policies is to be interpreted in accordance with the way it would be understood by the average man, rather than in a technical sense.

Sowa v. Nat'l Indemnity Co., 102 Wn.2d 571, 576-77, 688 P.2d 865 (1984) (quoting *Dairyland Ins. Co. v. Ward*, 83 Wn.2d 353, 358, 517 P.2d 966 (1974)) (internal citations omitted).

Section F.1.b. which is entitled "Other Liability Coverage From Other Sources" must thus be analyzed only from what American Family drafted into its policy, and not from what can be gleaned by scholars after hours of legal research and consideration of pages of argument. American Family's repeated characterization in its brief of Section F.1.b. as a UIM "anti-external-stacking provision", simply because the UIM statutes allow an insurer to draft such a provision, is unwarranted.

As noted above, the phrase "anti-stacking" is not used in the title or the body of the policy provision at issue. Resolution of this appeal requires careful analysis of Section F.1.b., and whether it unambiguously operates as a UIM anti-external stacking provision that would disallow UIM coverage to Tonya Hedges under her own auto policy.

III. There are three interpretations of Section F.1.b. before this court. If more than one of these interpretations is reasonable, Section F.1.b. is, by definition, ambiguous and must be

construed in favor of Tonya Hedges.

"The criteria for interpreting insurance policies in Washington are well settled." *Quadrant Corp. v. American States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005). Courts "*consider the policy as a whole*" and give it a "fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance." *Id.* (emphasis added). "Most importantly, if the policy language is clear and unambiguous, [courts] must enforce it as written; [courts] may not modify it or create ambiguity where none exists." *Id.*

Where a policy is susceptible to more than one reasonable interpretation, the policy is ambiguous. *West Coast Pizza Co., Inc. v. United Nat'l Ins. Co.*, 166 Wn.App. 33, 38, 271 P.3d 894 (Div. 1 2011). Washington law is clear: if an insurance clause is ambiguous, it must be construed against the insurer:

> Exclusionary clauses are to be most strictly construed against the insurer. *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 406, 229 P.3d 693 (2010). Where there is room for two constructions of an exclusionary clause, one favorable to the insured and one favorable to the insurer, courts must adopt the construction favorable to the insured. *Murray v. W. Pac. Ins. Co.*, 2 Wn.App., 985, 992, 472 P.2d 611 (1970).

Reliable Credit Ass'n, Inc., 171 Wn.App. 630, 638-39, 287 P.3d 698 (2012); *Queen City Farms, Inc. v. Central Nat'l Ins. Co.*, 126 Wn.2d 50,

68, 882 P.2d 703 (1994), 891 P.2d 718 (1995). Where a policy provision is ambiguous, this rule trumps what an insurer may have intended:

> Where a provision of a policy of insurance is capable of two meanings, or is fairly susceptible of two constructions, the meaning and construction most favorable to the insured must be employed, *even though the insurer may have intended otherwise. This rule applies with added force in the case of exceptions and limitations to a policy's coverage.*

Greer v. Northwestern Nat'l Ins. Co., 109 Wn.2d 191, 203, 743 P.2d 1244 (1987) (emphasis added) (citing *Shotwell v. Transamerica Title Ins. Co.*, 91 Wn.2d 161, 167-68, 588 P.2d 208 (1978)).

The rule which resolves ambiguities in favor of an insured applies with equal force to ambiguities contained in captions to an insurance policy. *Greer*, 109 Wn.2d at 199. In interpreting an insurance policy, courts look not only to the policy language itself, but also to the captions that structurally organize the policy. *Id.* Captions and headings are important in that they inform "the policyholder what subject is covered" in the provision. *Vadheim*, 107 Wn.2d at 841. "Captions are a part of an insurance contract and should be construed with the detailed provision." *Greer v. Northwestern Nat'l Ins. Co.*, 36 Wn.App. 330, 336, 674 P.2d 1257 (1984) *aff'd Greer*, 109 Wn.2d 191.

"Undefined terms in an insurance policy must be given a fair, reasonable, and sensible construction as would be given by an average

insurance purchaser." *North Pacific Ins. Co. v. Christensen*, 143 Wn.2d 43, 48, 17 P.3d 596 (2001). "The terms of the policy must be understood in their plain, ordinary, and popular sense." *Id.*

A. The trial court's conclusion that Section F.1.b. is ambiguous and should be construed to allow UIM coverage for Tonya Hedges is reasonable.

Appellate courts review orders granting or denying summary judgment *de novo*, performing the same inquiry as the trial court. *McDevitt v. Harborview Medical Center*, 179 Wn.2d 59, 64, 316 P.3d 469 (2013). Despite the *de novo* standard applicable here, however, the trial court's conclusion that Section F.1.b. was and is ambiguous is noteworthy, and Judge Lewis' ultimate interpretation of Section F.1.b., "[a]fter reviewing the entire policy on multiple occasions" (CP 68), is certainly relevant to at least show one reasonable interpretation of the ambiguous provision. The trial court concluded that, while Section F.1.b. is indeed ambiguous, its final paragraph should be interpreted as follows:

> * * *
>
> c. Total recovery under 'all such policies or provisions of coverage' is limited. All such policies or provisions of coverage refers to underinsured motorist coverage. But in determining the cap to be placed on underinsured motorist coverage, American Family Insurance drafted a provision which referred to 'the highest applicable limit for **any** one vehicle under **any insurance providing coverage** on either a primary or excess basis' (emphasis supplied). In determining the cap to be placed on underinsured motorist coverage, therefore, the court must consider any coverage

related to this occurrence.

d. In this case, three separate insurance policies provide coverage for this occurrence. The primary coverage available is the liability coverage for bodily injury provided by Arthur Beagle's policy. This coverage also provides the highest applicable limit of any of the coverages involved—$250,000.00. This is the 'highest applicable limit' which must be applied in this case, in determining the maximum amount that Hedges can recover under underinsured motorist policies.

e. Under Section F.1.b., Hedges may not receive more than $250,000.00 in underinsured motorist coverage benefits. Even if both underinsured motorist policies at issue in this case paid the maximum amount of recovery, Hedges would receive $200,000.00 in underinsured motorist coverage damages. The cap is not implicated, and does not limit American Family Insurance Company's liability for payment under its policy.

(CP 17) (emphasis in original).[4]

It is difficult to argue that the above is not a reasonable analysis of Section F.1.b.—an ambiguous insurance policy provision that must be construed in favor of the insured.

As is noted above, and in Appellant's Brief (at p. 16), a clause is ambiguous only if on its face it is fairly susceptible to two different and reasonable interpretations. *Quadrant Corp., supra,* 154 Wn.2d at 171. Here, Judge Lewis interpreted Section F.1.b. to mean that Tonya Hedges is entitled to up to additional $100,000 in UIM coverage from American

[4] As is touched on above, despite American Family's multiple proclamations that this interpretation was not forwarded by Plaintiff to the trial court, this theory was argued generally in Plaintiff's brief in support of her motion for summary judgment. (CP 67-70.)

Family based upon the analysis of the language of the clause as set forth in his written opinion. Reading his opinion, his interpretation of the clause is reasonable.

B. Tonya Hedges' interpretation of Section F.1.b. is reasonable.

On the other hand, it would be reasonable to conclude, after considering the policy as a whole (as will be discussed further *infra*), that none of the sentences of Section F.1.b. can be read to be exclusively referring just to UIM coverage and UIM limits. For the reasons outlined herein, the outcome from that second plausible interpretation would be the same as was reached by Judge Lewis—Tonya Hedges would be entitled to UIM coverage from American Family.

C. American Family advances a third interpretation.

American Family, as a third approach, suggests that the only reasonable interpretation of Section F.1.b., since it sits in the middle of a UIM endorsement, is to ignore the references to "Liability Coverage" and "liability limits" that permeate the clause and its caption, assume they have somehow been fictitiously reassigned the meanings "Underinsured Motorist Coverage" and "underinsured motorist coverage limits" and conclude that Tonya Hedges was appropriately denied UIM coverage by American Family under her own insurance policy.

If more than one of the above (or any other) interpretation of Section F.1.b. are reasonable interpretations, then Section F.1.b. is ambiguous. And in the face of an ambiguity, the policy must be construed in favor of Tonya Hedges. *West Coast Pizza v. United Nat. Ins. Co.*, 166 Wn.App. at 37-38. The trial court so concluded, and its ruling in that regard should be affirmed.

Of course, this court may affirm the trial court's decision upon the trial court's own reasoning, or upon alternative grounds. *Bernal v. American Honda Motor Co., Inc.*, 87 Wn.2d 406, 414, 553 P.2d 107 (1976). Below are additional points to consider in analyzing the policy and specific provisions at issue.

IV. "Liability coverage" is not interchangeable with "underinsured motorist coverage" under Washington case law.

"Liability Coverage" has not been understood to include "underinsured motorist coverage" to the exclusion of liability insurance coverage as is contended here by American Family. The state Supreme Court case of *Allstate v. Batacan*, 139 Wn.2d 443, 986 P.2d 823 (1999), clearly makes the distinction between "liability" insurance and "underinsured motorist coverage":

> As we have previously explained, notwithstanding its tort-oriented appearance, uninsured and underinsured motorist coverages are most appropriately characterized as <u>two-party contractual relationships</u>

> between the insurer and the insured. Most important to the issue before us is the fact that liability insurance is primary; UIM is secondary. UIM coverage should *supplement,* but not supplant, liability insurance. As we have recently and repeatedly explained, 'UIM insurance provides a second layer of excess insurance coverage that 'floats' on top of recovery from other sources for the injured party.'

Allstate v. Batacan, 139 Wn.2d at 455 (*italics* in original, underlined added) (internal citations omitted); *see also, e.g., Finney v. Farmers Ins. Co.* 92 Wn.2d 748, 600 P.2d 1272 (1979) "where a negligent owner of an automobile is not covered by liability insurance... the [plaintiff] is entitled to recover under the [UIM policy]." (emphasis added).

"Liability coverage" as used in Section F.1.b. is not interchangeable with "underinsured motorist coverage" under Washington case law, although American Family wants this Court to believe that it is.

V. All apples are fruit, but not all fruit are apples.

For Section F.1.b. to be construed to mean what American Family wants it to be read to mean, this Court would have to find that the phrase "Liability Coverage" as used in the title of Section F.1.b. means exclusively "Underinsured Motorist Coverage", and that the phrase "liability limits" as used in the body of Section F.1.b., means exclusively "underinsured motorist coverage limits." For the reasons explained below, however, such a construction would require the interpretation of an

ambiguity in favor of American Family when the law of this state actually requires an interpretation in favor of the insured, Tonya Hedges.

A. Throughout the policy and in all of its endorsements, American Family Insurance used the phrase "liability coverage" to refer only to tortfeasor liability coverage.

The title of Section F.1.b. is "Other *Liability Coverage* From Other Sources." (CP 54) (emphasis added). American Family chose not to define the phrase "liability coverage" in the policy or in any of its endorsements. The legislature similarly does not define it in the UIM statutes.

In addition to using the phrase "liability coverage" in Section F.1.b., American Family used the phrase "Liability Coverage" a total of eleven other times throughout the policy and in its endorsements. Note as we identify these below[5] that American Family used each to refer to liability insurance coverage for the fault of a tortfeasor—covering the insured for liability for his or her own tort, or referring to the liability insurance coverage for a third party tortfeasor.

1. American Family used "LIABILITY COVERAGE" as the section heading for the tortfeasor liability section of the policy:

PART I – LIABILITY COVERAGE

[5] Though the language in the policy was not *italicized*, it is italicized here to distinguish it from the text of Respondent's Brief.

(CP 44) (underline added).

2. American Family used "Liability coverage" as part of the provision that defines when an insured has "Part I – Liability Coverage":

> *A. INSURING AGREEMENT*
> ***You*** *have this coverage if Bodily Injury Liability and Property Damage Liability coverage is shown in the Declarations.*

(CP 44) (underline added).

3. American Family used "Liability Coverage" in "Part I – Liability Coverage" to limit the coverage available for liability in certain instances:

> *2. Other insurance.*
> ***
> *b. Other Liability Coverage from Other Sources*
> *If there is other auto liability insurance for a loss covered by this part,* ***we*** *will pay* ***our*** *share according to this policy's proportion of the total of all liability limits. But any insurance provided under this part for a vehicle you do not own is excess over any other collectible auto liability insurance.*

(CP 46) (underline added).

4. American Family used "Liability coverage" in "Part II – Car Damage Coverages" to explain that American Family may deduct certain amounts from amounts payable:

> *7. Any amount paid or payable for damage to* ***your insured car*** *under the Liability coverage of any policy issued by* ***us*** *shall be deducted from any amounts payable under this part.*

(CP 48) (underline added).

5. American Family used "liability coverage" in the General

Conditions to the policy to identify situations in which American Family could not be sued:

> 9. *Suit Against Us*
> ***We*** *may not be sued unless all of the terms of this policy are complied with.* ***We*** *may not be sued under the liability coverage until the obligation of the person* ***we*** *insure to pay is finally determined either by judgment against that person at the actual trial or by written agreement of that person, the claimant and* ***us****.* ***We*** *may not be sued under the uninsured motorist coverage on any claim that is barred by the tort statute of limitations. No person or organization has any right under this policy to bring* ***us*** *into any action to determine the liability of a person* ***we*** *insure.*

(CP 49) (underline added).

6-7. American Family twice used "liability coverage" in the UIM endorsement to the policy to exclude certain vehicles from the policy's definition of "underinsured motor vehicle":

> ***Underinsured motor vehicle*** *does not mean a land motor vehicle:*
> ***
> *b. insured under the liability coverage of this policy. This exclusion to the definition of* ***underinsured motor vehicle*** *does not apply to* ***you*** *or a* ***relative*** *if* ***you*** *or a* ***relative*** *sustained damages while* ***occupying****, or when struck by, a vehicle for which the liability coverage of this policy applies.*

(CP 52) (underline added).

8. American Family used "Liability Coverage" in the UIM endorsement to the policy to exclude certain damages from UIM coverage:

> *D. EXCLUSIONS*

1. ***We*** *do not provide Underinsured Motorist Coverage for* ***bodily injury*** *or* ***property damage*** *sustained:*
   a. *by an* ***insured person*** *while* ***operating*** *or* ***occupying*** *any motor vehicle owned by that* ***insured person*** *which is not insured for Liability Coverage under this policy.*

(CP 53) (underline added).

9. American Family used "LIABILITY COVERAGE" in the caption of one of the sections in the Washington Changes endorsement:

II. LIABILITY COVERAGE is changed as follows:

(CP 57) (underline added).

10. American Family used "liability coverage" in the Washington Changes endorsement to identify situations in which American Family could not be sued:

D. Paragraph 9. Suit Against Us is deleted and replaced with the following:
   9. Suit Against Us
   We may not be sued unless all the terms of this policy are complied with. We may not be sued under the liability coverage until the obligation of the person we insure to pay is finally determined either by judgment against that person at the actual trial or by written agreement of that person, the claimant and us. We may not be sued under the Underinsured Motorist Coverage on any claim that is barred by the statute of limitations. No person or organization has any right under this policy to bring us into any action to determine the liability of a person we insure.

(CP 58) (underline added).

11. Finally, American Family used "Liability Coverage" in the

Washington Cancellation and Nonrenewal Endorsement to identify circumstances under which it could not refuse to renew coverages:

> *(2) **We** may not refuse to renew the Liability Coverage or the Collision Coverage under Car Damage Coverages of the policy on the basis of one or more claims made under the:*
> *(a) Comprehensive Coverage under Car Damage Coverages; or*
> *(b) Emergency Road Services Coverage of this policy.*

(CP 59) (underline added).

In every single instance cited above, American Family used the phrase "liability coverage" in the policy and in its endorsements clearly in reference to tortfeasor liability insurance. This was even the case when American Family used "liability coverage" within the UIM endorsement to the policy.

It is on this landscape that we come to American Family again using "Liability Coverage" in the title/caption of Section F.1.b.:

> *b. Other Liability Coverage From Other Sources*

(CP 54) (underline added).

This is the only other time, other than the eleven times mentioned above, that American Family used this phrase "liability coverage" in the policy or in its endorsements. American Family did not use "liability coverage" in any other policy provision or caption to denote or suggest

that the phrase meant, or even included, underinsured motorist coverage.

By choosing to use the phrase "Liability Coverage" throughout the policy and in its endorsements to mean, exclusively, tortfeasor liability insurance, and then to use that same phrase in the caption of Section F.1.b., American Family set the parameters of what "similar" insurance coverages are being addressed elsewhere within the body of Section F.1.b.—tortfeasor liability insurance coverages and liability insurance limits. Without any contrary definition having been set forth within the policy, this is the plain meaning of that phrase, and especially after looking at the policy as a whole, how the average insurance purchaser would understand it. American Family cites *Greengo v. Public Employees Mutual Ins.*, 135 Wn.2d 799, 806-07, 959 P.2d 657 (1998) as support for its contention that, "In the UIM context, '[t]he term "similar insurance" is appropriately understood to be other underinsured motorist insurance coverages.'" (Appellant's Brief, at 18). Although this is a correct recitation of the holding of *Greengo*, Section F.1.b. is vastly different from the anti-stacking clause at issue in *Greengo*. The anti-stacking provision in *Greengo* referred expressly to "underinsured motorist coverage." *Greengo*, 135 Wn.2d at 804. Specifically, the anti-stacking provision in *Greengo* reads as follows:

> If this policy and any other policy providing **underinsured motorist** coverage apply to the same loss, the maximum limit of liability under all policies will be the highest limit of liability that applies under any one policy.

Id.

The anti-stacking provision in *Greengo* was not plagued by the ambiguity present in Section F.1.b. because in that case the insurer expressly used the phrase "underinsured motorist coverage" instead of "liability coverage." American Family's exclusive use of the phrase "liability coverage" throughout the policy at issue in this case to mean tortfeasor liability coverage, coupled with its placement of that phrase into the language of Section F.1.b instead of any reference to UIM coverage, overrides the clarity otherwise afforded by the court's language in *Greengo*.[6] Further, as will be discussed *infra* at Sections V.B. through V.D. of this brief, *Greengo* is distinguishable because it refers to "limit of

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[6] The trial court concluded that *Greengo* applied to conclusively establish that Section F.1.b. "is a limitation on the insured's ability to stack uninsured motorist coverage from multiple policies." Plaintiff disagrees that the rule in *Greengo* is so strong as to overcome the plain language of the title of Section F.1.b. because Section F.1.b. uses the phrases "Other *Liability Coverage* From Other Sources" (emphasis added) and refers to "liability limits", phrases which were not used in *Greengo*. This language removes Section F.1.b. from the "appropriate understanding" expressed by the court in *Greengo*. In any event, despite Judge Lewis concluding that "other similar insurance" should be interpreted to mean other underinsured motorist insurance coverages, he recognized that the final Section F.1.b. language which states that "the highest applicable limit for **any** one vehicle under **any insurance providing coverage"** requires inclusion of any coverage related to the collision of October 27, 2010, which encompasses the $250,000 Farmers tortfeasor liability policy. (CP 69) (bold in original) (underline added).

liability" and not "liability limits" as American Family drafted into Section F.1.b. By using "Liability Coverage" in the title to Section F.1.b., and "liability limits" in the body of Section F.1.b., American Family removed Section F.1.b. out of "the UIM context" and into "the liability context."

The distinction between "liability coverage" and "underinsured motorist coverage" is highlighted by American Family's own use of "underinsured motorist coverage" elsewhere throughout the policy when it intended to refer to UIM coverage.

B. Throughout the policy and in its endorsements, American Family used "underinsured motorist coverage" not "liability coverage" when intending to refer to underinsured motorist coverage.

The drafters of the American Family policy and its endorsements seemingly understood the difference between "liability coverage" and "underinsured motorist coverage"[7] and thus should have been aware of the ambiguity that would be created when the phrase "Liability Coverage" was written instead of "underinsured motorist coverage." Throughout the policy and in its endorsements, American Family used "underinsured

[7] Though there may be statutory differences between "underinsured motorist coverage" and uninsured motorist coverage", in its policy at issue here American Family uses "uninsured motorist coverage", "underinsured motorist coverage", and "underinsured motorists coverage" interchangeably and without defining or distinguishing them. For the purposes of this analysis the distinction is irrelevant and each are included as if they were the same term.

motorist coverage" ten times to identify situations in which it intended that the concept of uninsured motorist coverage be applied:

1. American Family used "UNDERINSURED MOTORIST COVERAGE" in the title of the underinsured motorist coverage endorsement:

> *UNDERINSURED MOTORIST COVERAGE - WASHINGTON*

(CP 52) (underline added).

2. American Family used "Underinsured Motorist Coverage" to explain when an insured had such coverage:

> ***You** have Underinsured Motorist Coverage if Underinsured Motorist – Bodily Injury is shown in the Declarations. **You** have Underinsured Motorist Property Damage Coverage if Underinsured Motorist Property Damage is shown in the Declarations.*

(CP 52) (underline added).

3. American Family used "Underinsured Motorist Coverage" to identify the coverage being provided in the Underinsured Motorist Coverage endorsement:

> *With respect to the Underinsured Motorist Coverage provided by this endorsement, the provisions of the policy apply except as changed by this endorsement.*

(CP 52) (emphasis added).

4-5. American Family used "Underinsured Motorists Coverage" two

times to explain the steps an insured person must take to obtain underinsured motorist coverage under the policy:

> *A. IF YOU HAVE AN AUTO ACCIDENT OR LOSS*
> *The following is added:*
> *1. A person seeking Underinsured Motorists Coverage must also promptly notify **us** of a tentative settlement between an **insured person** and the insurer of the **underinsured motor vehicle** and allow **us** a reasonable time to advance payment to that **insured person** in an amount equal to the tentative settlement to preserve **our** rights against the insurer, owner or operator of such **underinsured motor vehicle**. However, this Paragraph (1.) does not apply if failure to notify **us** does not prejudice **our** rights against the insurer, owner or operator of such **underinsured motor vehicle**.*
> *2. If there is no physical contact with the vehicle causing the accident, any person, or someone on that person's behalf, seeking Underinsured Motorist coverage must:*
> *a. notify the police or other appropriate law enforcement agency within 72 hours of the accident; and*
> *b. have the facts of the accident corroborated by competent evidence other than the testimony of any person have an Underinsured Motorist claim resulting from the accident.*

(CP 52) (underline added).

6. American Family used "Underinsured Motorist Coverage" to explain when its right to recovery did not apply:

> *3. Our Recovery Rights*
> *The following is added to the provision:*
> *a. **We** shall be entitled to a recovery only after the person has been fully compensated.*
> *b. **Our** recovery rights do not apply with respect to Underinsured Motorist Coverage if **we**:*
> *(1) have been given prompt written notice of a tentative settlement between an **insured person** and the insurer*

*of an **underinsured motor vehicle**; and*
(2) fail to advance payment to the insured person in an amount equal to the tentative settlement within a reasonable time after receipt of notifcation.

(CP 54) (underline added).

7. American Family used "Underinsured Motorist Coverage" to explain what happens if American Family makes an advance payment:

> *c. If **we** advance payment to the **insured person** in an amount equal to the tentative settlement within a reasonable time after receipt of notification:*
> *(1) that payment will be separate from any amount the **insured person** is entitled to recover under the provisions of Underinsured Motorist Coverage.*
> *(2) we also have a right to recover the advance payment.*

(CP 54) (underline added).

Notably, three of the times American Family used the phrase "underinsured motorist coverage" it did so within the same policy provision as the phrase "liability coverage". In each of such instances, American Family did so clearly intending specific, and commonly distinguished meanings:

8. American Family used "uninsured motorist coverage" alongside "liability coverage" to explain situations in which American Family could not be sued:

> *9. Suit Against Us*
> ***We** may not be sued unless all of the terms of this policy are complied with. **We** may not be sued under the liability coverage*

until the obligation of the person ***we*** *insure to pay is finally determined either by judgment against that person at the actual trial or by written agreement of that person, the claimant and* ***us****.* ***We*** *may not be sued under the uninsured motorist coverage on any claim that is barred by the tort statute of limitations. No person or organization has any right under this policy to bring* ***us*** *into any action to determine the liability of a person* ***we*** *insure.*

(CP 49) (underline added).

9. American Family used "underinsured motorist coverage" alongside "liability coverage" to explain a situation in which it did not provide underinsured motorist coverage:

D. EXCLUSIONS
1. ***We*** *do not provide Underinsured Motorist Coverage for* ***bodily injury*** *or* ***property damage*** *sustained:*
a. by an ***insured person*** *while operating or* ***occupying*** *any motor vehicle owned by that* ***insured person*** *which is not insured for Liability Coverage under this policy.*

(CP 53) (underline added).

10. American Family used "underinsured motorist coverage" alongside "liability coverage" in the Washington Changes endorsement to change the provision expressing when suit may not be brought against it:

D. Paragraph 9. Suit Against ***Us****, is deleted and replaced with the following:*
9. Suit Against ***Us***
We *may not be sued unless all the terms of this policy are complied with.* ***We*** *may not be sued under the liability coverage until the obligation of a person* ***we*** *insure to pay is finally determined either by judgment against that person at the actual trial or by written agreement of that person, the claimant and*

> ***us.*** ***We*** *may not be sued under the Underinsured Motorist Coverage on any claim that is barred by the statute of limitations. No person or organization has any right under this policy to bring us into any action to determine the liability of a person* ***we*** *insure.*

(CP 58) (underline added).

By using the phrase "Underinsured Motorist Coverage" as a phrase of art alongside "Liability coverage" as a phrase of art, American Family reinforced throughout the policy that "underinsured motorist coverage" refers to underinsured motorist coverage, and "liability coverage" refers to tortfeasor liability insurance coverage. Because American Family captioned Section F.1.b. using the phrase "Liability Coverage", the exclusion would most logically be understood to refer to "liability coverage". There is nothing in the policy, statutes, or common law which would cause even a legal scholar, much less an average purchaser of insurance, to conclude that "liability coverage" in Section F.1.b. refers to "underinsured motorist coverage".

Having included the phrase "Liability Coverage" in the caption of Section F.1.b., this tortfeasor liability theme then reoccurs in the body of Section F.1.b. as American Family included the phrase "all *liability limits*" (emphasis added) in the opening sentence of the provision.

C. Throughout the policy and in its endorsements, American Family used "liability limits" to refer only to tortfeasor

liability limits.

Just as American Family used "liability coverage" to refer to tortfeasor liability coverage throughout the policy, American Family used "liability limits", exclusively, in the context of tortfeasor liability limits throughout the policy.

Section F.1.b. uses the phrase "liability limits", not "limit of liability" or "limits of liability." This difference is important. "Liability limits" focuses the reader on the "liability" insurance coverage in the policy. "Limits of liability" at least focuses the reader on the "limits" for whatever type of coverage is under discussion.

In addition to using the phrase "liability limits" in Section F.1.b., American Family used "liability limits" or "liability limit" seven other times in the policy and in its endorsements. Again, note that each is used in reference to tortfeasor liability insurance coverage limits, not UIM coverage limits.

1-4. American Family used "liability limit" four times in the provision discussing the tortfeasor limits of liability:

> *E. LIMITS OF LIABILITY*
> *1. The limits of liability shown in the Declarations apply, subject to the following:*
> *a. the **bodily injury** liability limit for "each person" is the maximum for **bodily injury** sustained by one person in any one occurrence.*

b. *subject to the **bodily injury** liability limit for "each person", the **bodily injury** liability limit for "each occurrence" is the maximum for **bodily injury** sustained by two or more persons in any one occurrence.*
c. *the **property damage** liability limit for "each occurrence" is the maximum for all damages to all property in any one occurrence.*

(CP 45) (underline added).

5. American Family used "liability limits" in the "Liability Coverage" anti-stacking provision:

b. *Other Liability Coverage From Other Sources*
*If there is other auto liability insurance for a loss covered by this Part, **we** will pay **our** share according to this policy's proportion of the total of all liability limits. But any insurance provided under this Part for a vehicle **you** do not own is excess over any other collectible auto liability insurance.*

(CP 46) (underline added).

6. American Family used "liability limits" to refer to tortfeasor liability limits in the UIM endorsement in its definition of an "underinsured motor vehicle":

3. ***Underinsured motor vehicle** means a land motor vehicle which is:*
a. *not insured by a liability bond or policy at the time of the accident.*
b. *insured at the time of the accident by a liability bond or policy with liability limits below the minimum financial responsibility limits required by the law of the **state** in which **your insured car** is principally garaged.*

(CP 52) (underline added).

7. American Family used "liability limits" in the UIM endorsement to explain a situation in which it would reduce an insured person's damages by amounts available to, but not obtained by, the insured person:

> *4. If the **underinsured motor vehicle** is insured by a liability bond or policy with **bodily injury** liability limits less than the amount an **insured person** is legally entitled to recover, **we** will reduce the total damages to an **insured person** by any amount available to that person under any bodily injury liability bonds or policies applicable to the **underinsured motor vehicle** that such **insured person** did not recover as a result of a settlement between that **insured person** and the insurer of an **underinsured motor vehicle**. However, any reduction of the **insured person's** total damages will not reduce the limit of liability for this coverage.*

(CP 53) (underline added).

Again, up to this point, every single time American Family used the phrase "liability limits" or "liability limit" in the policy and in its endorsements, it did so clearly in reference to tortfeasor liability insurance limits. This is even true where American Family used "liability limits" in the UIM endorsement to the policy.

American Family then again used the phrase "liability limits" in Section F.1.b.:

> *b. Other Liability Coverage From Other Sources*
> *If there is other similar insurance for a loss covered by this endorsement, **we** will pay **our** share according to this policy's proportion of the total of all liability limits. But any insurance provided under this endorsement for an **insured person** while **occupying** a vehicle **you** do not own, including any vehicle*

> *while used as a temporary substitute for* ***your insured car*** *is excess over any other similar insurance. Any recovery for damages under all such policies or provisions of coverage may equal* ***but*** *not exceed the highest applicable limit for any one vehicle under any insurance providing coverage on either a primary or excess basis.*

(CP 54) (underline added).

This is the only other time, other than seven times mentioned above, that American Family used this phrase in the policy and in its endorsements. American Family never used "liability limits" in any other policy provision or caption to denote or suggest the term exclusively meant, or even included, underinsured motorist limits.

By choosing to refer to "liability limits" in Section F.1.b., American Family set the parameters of what limits are being addressed therein—tortfeasor liability insurance coverage limits. This is exclusively how "liability limits" is used throughout the policy and how the plain meaning of that phrase, read in conjunction with the whole policy and without any contrary definition from within the endorsement or the policy as a whole, would be understood by the average insurance purchaser.

In an attempt to justify its use of "liability limits" in Section F.1.b. in Appellant's Brief, American Family misconstrues Tonya Hedges' trial court argument and has misapplied RCW 48.22.030(5) and RCW 48.22.030(6) (see Appellant's Brief, 26-28). Specifically, American

Family's brief states:

> Plaintiff's primary argument to the trial court was that the other-insurance section was ambiguous because it referred to '*limits of liability*,' '*limit of liability*,' and '*liability limits*.' Plaintiff argued that these phrases apply only in the context of insurance for liability imposed by law for bodily injury, death, or property damage and, consequently, they rendered ambiguous whether the other-insurance section even applied to underinsured motorist coverage.

(Appellant's Brief, 26) (emphasis added).

This is not, however, an accurate recitation of Tonya Hedges' argument. Stated correctly, in Section F.1.b., American Family used the phrase "liability limits." In that section it did not use the phrases "limit of liability" or "limits of liability." Tonya Hedges' point was and is that because American Family used the phrase "liability limits" (which it had repeatedly used only to mean tortfeasor liability coverage limits in all other parts of the policy) and not "limit of liability" or "limits of liability", Section F.1.b., placed as it is in the heart of a UIM endorsement, is confusing and ambiguous because it refers to tortfeasor liability coverage limits, not underinsured motorist coverage limits.

D. In the UIM statute the legislature used "limit of liability or "limits of liability".

The underinsured motorist statute, by comparison, uses only the phrases "limit of liability" and "limits of liability" to describe the

maximum amount of underinsured motorist benefits available to an insured. RCW 48.22.030(5) ("The *limit of liability* under the policy coverage may be defined as the maximum *limits of liability* for all damages resulting from any one accident regardless of the number of covered persons, claims made, or vehicles or premiums shown on the policy or premiums paid, or vehicles involved in an accident") (emphasis added); RCW 48.22.030(6) ("The policy may provide that if an injured person has other similar insurance available to him or her under other policies, the total *limits of liability* of all coverages shall not exceed the higher of the applicable limits of the respective coverages") (emphasis added). While the statutes themselves may be less than ideal in terms of understandability, neither statutory subsection uses the phrase "liability limits", and both "limit of liability" and "limits of liability" are different in meaning from "liability limits" as has been detailed above.

Importantly, there are additional and stark differences between Section F.1.b. and the UIM statute quoted above. Namely, the statute references "the total limits of liability of all coverages." RCW 48.22.030(6). Section F.1.b., on the other hand, takes this already hard to interpret language and makes it exponentially more ambiguous by referencing "the total of all liability limits." It transfers the focus of the

word "all" as a qualifying adjective from acting on the word "coverages" to acting on the phrase "liability limits". And we already know from the above briefing that throughout the American Family policy up to this point "liability limits" has been used exclusively by American Family to mean torfeasor liability limits, not UIM coverage limits. The result of American Family's botched paraphrasing of the words of the UIM statute thus is to inevitably impart in the reader confusion that was narrowly avoided by the drafters of the statute's having chosen the phrase "the total limits of liability of all coverages". This subtle change wreaks havoc on the ability to understand what American Family now contends was its intended meaning of Section F.1.b. In the face of such ambiguity, the only acceptable interpretation is one that is construed in favor of coverage.

Having the benefit on this appeal of knowing what American Family actually meant for this provision to say, it might be useful to point out how its drafters could have phrased Section F.1.b. to have it NOT be ambiguous. All ambiguities in Section F.1.b. could have been resolved had American Family drafted it to reference underinsured motorist coverage and underinsured motorist limits. Section F.1.b. could have simply read as follows (omissions have been ~~stricken through~~ and additions have been *italicized*):

> b. Other ~~Liability~~ *Underinsured Motorist* Coverage From Other Sources
>
> If there is other similar insurance for a loss covered by this endorsement, **we** will pay **our** share according to this policy's proportion of the total of all ~~liability~~ *underinsured motorist* limits. But any insurance provided under this endorsement for an **insured person** while **occupying** a vehicle **you** do not own, including any vehicle while used as a temporary substitute for **your insured car**, is excess over any other similar insurance.
>
> Any recovery for damages under all such policies or provisions of coverage may equal but not exceed the highest applicable limit for any one vehicle under any insurance providing coverage on either a primary or excess basis.

It would have been that simple. No ambiguity, construction, or interpretation required.

Despite the differences between the statute and Section F.1.b., American Family in its brief quotes from the "limits of liability" provision of its underinsured motorist endorsement (not Section F.1.b., which is at issue, but Section E.2 (CP 53) which is not at issue) as support that "consistent with the underinsured motorist statute" it used "limits of liability" in its underinsured motorist endorsement (Appellant's Brief 27). While this is a factually true statement, it supports Tonya Hedge's position, not American Family's. This demonstrates that American Family knew how to distinguish between "limits of liability" and "liability limits."

It used "limits of liability" in Section E but not in Section F.1.b. It used only the phrase "liability limits." By choosing to use the phrase "liability limits", American Family removed whatever mileage might have been gained from a comparison to the language contained in the underinsured motorist statute and instead replaced it with a phrase that had only been used elsewhere throughout the American Family policy to denote tortfeasor liability limits.

Finally, on this point, American Family seems to be attempting to argue much the same argument as was recently rejected by the Washington Supreme Court in *Reliable Credit Ass'n, Inc.*, 171 Wn.App. 630. The insurer asked the court to "ignore the normal standards of interpretation of insurance policies because 'the language in the endorsement is required by statute and administrative rule.'" *Id.* at 639. The court rejected the insurer's argument that the insurance policy's terms could not be ambiguous just because the insurer tried to follow the statute. *Id.* at 703. The court stressed that neither the statute nor the policy defined the "critical terms" of the exclusion. *Id.* Ultimately, despite the insurer's claims that the policy provisions mirrored the statute, the court determined that its policy provisions were ambiguous and construed the policy against the insurer and in favor of coverage for the insured. *Id.* at 653. Here, not

only did American Family fail to define the "critical terms", it failed to properly paraphrase from the statute—much less to actually quote therefrom.

E. Washington common law is flush with authority and analysis on anti-stacking provisions which use "limit of liability" or "limits of liability" to refer to the applicable limit of UIM coverage. It is void of anti-stacking provisions which use "liability limits" to refer to the applicable limit of UIM coverage.

Mutual of Enumclaw Ins. Co. v. Grimstad-Hardy, 71 Wn.App. 226, 232, 857 P.2d 1064 (1993), cited by American Family in its brief, cannot be relied upon to cure the ambiguity created in Section F.1.b. *Grimstad-Hardy* held that "'limit of liability' refers to the overall extent of liability under the policy." *Id.* Tonya Hedges does not dispute this. Here the ambiguity exists because American Family instead used the phrase "liability limits", which after reading this policy as a whole means something completely different than "limit of liability." *Grimstad-Hardy* did not address the ambiguity present in this policy and is therefore unhelpful to American Family's position.

In fact, after an exhaustive search, there appear to be no Washington cases[8] that use "liability limit" to refer to the applicable limit

[8] We must respond to American Family's reliance on *Frey v. Hartford Underwriters Ins. Co.*, 2005 WL 3143954, an unpublished district court case from the Eastern District of

of UIM coverage.[9]

It is also clear that American Family's attorneys themselves appreciate the distinction between "liability limits" and "limits of liability". Every time they intended to refer to the limit of liability of underinsured motorist coverage in their brief, they used "limit of liability",

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Wisconsin. While *Frey* does not even actually support American Family's position (the anti-external stacking clause uses "other applicable insurance...that is similar to the insurance provided under Part C Section II(1)" instead of "Other Liability Coverage From Other Sources"), American Family's reliance on the case shows its struggle to find any support for its position. Nevertheless, citation to unpublished opinions is only allowed in Washington if it is allowed under the law of the issuing court. GR 14.1(b). Fed. R. App. P. 32.1 governs the citation to unpublished federal opinions issued on or after January 1, 2007. Fed. R. App. P. 32.1 "The citation of unpublished opinions issued before January 1, 2007, will continue to be governed by the local rules of the circuits." Fed. R. App. P. 32.1 advisory committee's note. The local rules of the 8th Circuit state: "Unpublished opinions are decisions which a court designates for unpublished status. *They are not precedent....Unpublished opinions issued before January 1, 2007, generally should not be cited.* When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite an unpublished opinion. Parties may also cite an unpublished opinion of this court *if the opinion has persuasive value on a material issue and no published opinion of this court or another court would serve as well.*" US Court of Appeals, 8th Circuit, Local Rule 32.1A (emphasis added). The requirements of Fed. R. App. P. 32.1, and the local rules of the 8th Circuit, have not been met and consideration of *Frey*, a 2005 decision, as authority for any proposition in this case would be improper.

[9] *See e.g. Mutual of Enumclaw Inc. Co.*, 71 Wn.App. at 228 ("the total limits of liability of all coverage); *Federated Am. Inc. Co. v. Erickson*, 67 Wn. App. 670, 673, 828 P.2d 693 (Div. 3 1992) ("our share is the proportion that our limit of liability bears..."); *Hawn v. State Farm Mut. Auto. Ins. Co.*, 768 F.Supp. 293, 294 (E.D.Wn. 1991) ("limits of liability"); *Edwards v. Farmers Ins. Co. of Wash.*, 111 Wn.2d 710, 713, 763 P.2d 1226 (1988) ("limits of liability); *Safeco Corp. v. Kuhlman*, 47 Wn.App. 662, 664, 737 P.2d 274 (1987) ("limit of liability"); *Vadheim*, 107 Wn.2d at 844 ("limits of liability"); *Lien v. Allstate Ins. Co.*, 626 F.Supp 1132, 1134 (W.D.Wn. 1986), aff'd 823 F.2d 1553 (9th Cir. 1987) ("Limits of Liability" and limit of liability); *Furlong v. Farmers Ins. Co.*, 44 Wn.App. 458, 459, 721 P.2d 1010, *rev. den.* 107 Wn.2d 1017 (1986) ("limits of liability"); *Anderson v. American Economic Ins. Co.*, 43 Wn.App. 852, 859, 719 P.2d 1345 (Div. 1 1986) ("limit of liability").

not "liability limits."[10]

Not once in Appellant's Brief did American Family's attorneys use the phrase "liability limits" to refer to the limits of liability of UIM coverage in Appellant's brief—unless they were directly referring to Section F.1.b.[11] Not once does American Family cite in Appellant's Brief

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[10] (Appellant's Brief at p. 2) ("what is the maximum amount of underinsured motorist benefits that Plaintiff may recover from all underinsured motorist policies: $100,000 (the highest *limit of liability* for any one policy providing underinsured motorist coverage for the accident)") (emphasis added); (*Id.* at 6) ("Plaintiff argued that the anti-stacking provision does not have that effect and that, instead, benefits are available up to the policy's $100,000 *limit of liability* for underinsured motorist coverage.") (emphasis added); (*Id.* at 17) ("[Section F(1)(a)] bars stacking the *limits of liability* under such policies.") (emphasis added); (*Id.* at 20) ("American Family barred stacking of multiple underinsured motorist policies, but instead, provided that the maximum amount of underinsured motorist benefits recoverable under all such policies was the highest *limit of liability* under any of those policies...") (emphasis added); (*Id.* at 20) ("[T]here are two underinsured motorist policies applicable to her claim, and each has a $100,000 *limit of liability*.") (emphasis added); (*Id.* at 20) ("Therefore, the highest *limit of liability*, and the maximum amount she can recover, is $100,000."); (*Id.* at 21) (Thus, the trial court reached the incongruous, and apparently unprecedented, conclusion that an anti-external-stacking clause had the effect of allowing Plaintiff to stack underinsured motorist coverages to a limit greater than the combined *limit of liability* under all underinsured motorist policies applicable to the accident.") (emphasis added); (*Id.* at 22) ("The plaintiff's own underinsured motorist policy ($50,000 *limit of liability*)" (emphasis added) (citing *Doyle v. State Farm Ins. Co.*, 61 Wn.App. 640, 811 P.3d 968, *rev. den.*, 118 Wn.2d 1005 (1991)); (*Id.* at 23) ("Most significantly, in *Doyle*, the maximum amount of underinsured motorist coverage available under all underinsured motorist policies was set at 'the highest *limit of liability* that applies under any one policy'") (emphasis added) (citing *Doyle*, 61 Wn.App. at 642); (*Id.*) ("[*Doyle*] interpreted the provision as setting the maximum recovery under all underinsured motorist policies as being the highest *limit of liability* for underinsured motorist benefits under any underinsured motorist policy.") (emphasis added); (*Id.* at 27) ("Consistent with the underinsured motorist statute, American Family used the phrase '*limits of liability*' in its underinsured motorist endorsement to describe the maximum amount of benefits it would pay under the underinsured motorist coverage.") (citing CP 186.)

[11] On page 18 of Appellant's Brief, American Family does refer to "liability limits" in the context of underinsured motorist limits of liability—but it only does so as part of

to a case that upholds a UIM anti-external stacking provision that refers to "liability limits" in place of "limits of liability". Contrarily, the only Washington case cited by American Family in support of its interpretation of Section F.1.b., uses "limits of liability." *Doyle*, 61 Wn. App. 640 (1991). It is presumed that this lack of authority is because (as is expressed above in note 9) after diligent effort, American Family was also unable to find a single case that discussed a UIM anti-external stacking provision that uses the phrase "liability limits" to mean, "UIM limits", as Appellant contends Section F.1.b. must be construed to mean.

In short, Appellant is correct that "limits of liability" logically, and expectedly, could be understood to include the limits of liability applicable to any number of coverages in an insurance policy. It could include the limit of liability for personal injury protection coverage, for UIM coverage, or for liability coverage. But American Family did not utilize "limit of liability" in Section F.1.b. It used instead the phrase "liability limits". Where, as here, "liability limits" is used exclusively (in American Family's policy, in American Family's brief, in American Family's cited authority, and in general throughout Washington state common law) to

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paraphrasing from Section F.1.b. (Appellant's Brief 18) ("the next two sentences provide that UIM benefits are proportioned consistent with the policies' liability limits....").

mean only the limits of tortfeasor liability insurance coverage, "liability limits" should here also be construed to mean only tortfeasor liability insurance limits.

F. American Family drafted anti-stacking clauses in other coverages in its policy so as to eliminate the ambiguity in Section F.1.b.

American Family knew the importance of clearly identifying the coverages and limits applicable in an anti-stacking provision. It did so unambiguously, for example, in the Accidental Death and Specific Dismemberment Benefits Coverage Endorsement:

> D. CONDITIONS
>
> ***
>
> 4. **Other Insurance.** If two or more auto insurance policies providing *Accidental Death And Specific Dismemberment Benefits Coverage* are issued to **you** by **us** or any other member company of the American Family Insurance Group of companies, apply to the same auto accident, the total *limits of liability* under all such policies shall not exceed the highest *limit of liability for Accidental Death And Specific Dismemberment Benefits Coverage* under any one policy.

(CP 51) (emphasis added).

Unfortunately, American Family did not draft Section F.1.b. with the same clarity. Instead it seems to have done a poor job of cutting and pasting from the anti-stacking provision contained in the tortfeasor liability coverage section of the policy, thus engendering confusion and

requiring the extensive policy interpretation and construction at issue in this case.

The sequencing of words in a phrase can make a significant difference in meaning. Consider the adage, "all apples are fruits, but not all fruits are apples". Likewise, American Family's reversal of the order of the words contained within the phrase "limit of liability", to become the phrase "liability limits" as used in Section F.1.b., changed the meaning of what it now contends it intended its use of those words to convey.

VI. Because American Family used the phrases "liability coverage" and "liability limits" instead of "underinsured motorist coverage" and "underinsured motorist limits", "other similar insurance" and subsequent parts of Section F.1.b. may and should be construed as referring to "other liability insurance"—if not exclusively thereto, at least as inclusive thereof.

As noted, Section F.1.b. refers to liability coverage and liability limits. It does not refer to underinsured motorist coverage or to underinsured motorist limits. When read as drafted, and as would be understood by the average purchaser of insurance, the use of the phrase "similar insurance" in Section F.1.b. thus most logically refers to similar "liability coverage." If that is the case, it follows that the coverage afforded to Tonya Hedges and the limits applicable to her loss must be calculated based upon the proportion of American Family's underinsured motorist limit to the total of all liability limits. Possibly, though, "other

similar insurance" refers back to the subheading of Section F.1.b: "Other Insurance." If so, it is inclusive of both tortfeasor liability and UIM coverages. Determining exactly to which antecedent Section F.1.b. refers is very problematic given the ambiguity. In any event, if both UIM and liability coverages are part of the discussion by the time you get to the final sentence of Section F.1.b., then "the highest applicable limit" for any one vehicle under any insurance providing coverage includes the Farmers' $250,000 liability policy limit, and Tonya Hedges is entitled to $100,000 in UIM benefits from American Family.[12]

In this case, and to use American Family's vernacular, this created a third layer of coverage. American Family points out that the public policy for UIM coverage allows for a second layer of floating protection, but in its brief implicitly criticizes Tonya Hedges for asserting that she may be entitled to a third layer of coverage (Appellant's Brief, 12-13.) Again, however, what an insurer may do to contractually bar an insured from stacking UIM policies, and what it has actually done given the language it chose to place into the insurance contract, may be two different things. Where an insurer did not draft an unambiguous UIM anti-stacking

[12] We agree Tonya Hedges is limited to just $100,000 by the operation of the limits of liability section, Section E (CP 53), of the American Family UIM endorsement.

limitation into the policy, it would be against public policy to enforce such a provision anyway simply because it could have done so.

Here, Tonya Hedges paid American Family a premium for her UIM policy. In so doing, she bought whatever layers of protection her policy offered—even if that may be a third, or even a fourth, layer of UIM protection. Tonya Hedges is not attempting to gain something she did not pay for, rather she is attempting to gain the benefits promised by American Family as those benefits were and are written in the policy that American Family drafted.

VII. American Family's effort to explain why it contends Section F.1.b. must be read to deny Tonya Hedges UIM coverage under her American Family Insurance policy fails.

At pages 18-21 of Appellant's Brief, American Family attempts to explain why the confusing Section F.1.b. language that its policy drafters authored can only reasonably be interpreted to effectively exclude Tonya Hedges from being entitled to UIM coverage under her policy. Appellant's Brief in that regard, however, starts with a flawed premise—that "other similar insurance" (and hence "all such policies or provisions of coverage"), must to be read to refer to UIM policies and coverages exclusively. Each building block American Family then adds on top of its flawed initial premise, all the way up to its ultimate interpretation of

Section F.1.b. which would deny Tonya Hedges UIM coverage, also fail because the initial assumption is not sound. Quoting from its brief:

> Now we arrive at the final paragraph, which states:
>
> > Any recovery for damages under all such policies or provisions of coverage may equal but not exceed the highest applicable limit for any one vehicle under any insurance providing coverage on either a primary or excess basis.
>
> This paragraph addresses the maximum amount of underinsured motorist benefits the insured may recover when more than one underinsured motorist policy applies to a claim on either a primary or excess basis. First, the sentence makes clear that it is only concerned with underinsured motorist benefits because it refers to "all such policies." The only logical reading of this sentence is that the phrase "all such policies" refers back to "other similar insurance" discussed in the first sentence of the preceding paragraph within the same subsection. The phrase "all such policies" must refer to some antecedent reference to a type of policy. The closest antecedent reference is "other and similar insurance" which, as we have discussed, means other underinsured motorist coverage. Thus, at its very beginning, the final paragraph signals that it is addressing underinsured motorist coverage.

(Appellant's Brief, 19.)

However, the sentence being dissected here absolutely does NOT "make clear that it is only concerned with underinsured motorist benefits." The reference to "all such policies or provisions of coverage" is situated in and flows out of a subtitle to the whole section that reads "Other Liability Coverage From Other Sources", which is immediately preceded by a subtitle that simply reads "Other Insurance". Neither caption references "Underinsured Motorist Coverage"—despite all of Appellant's wishful

thinking. The "closest antecedent reference" that is the first building block in Appellant's shaky structure is thus a caption referring exclusively to "Liability Coverage", not to UIM coverage. In addition there is the reference in the first sentence of the body of Section F.1.b. to "all liability limits". As noted above, these phrases had NOT anywhere else in the policy been utilized to mean anything other than tortfeasor liability insurance and tortfeasor liability limits. It is in that context that the words "all such policies or provisions of coverage", and "any insurance providing coverage on either a primary or excess basis" must be considered. To rephrase the last sentence of the argument quoted from Appellant's Brief above so that it reads accurately, instead of inaccurately, "Thus, at its very beginning, the final paragraph signals that it is addressing **liability coverage**". (Substituted words in boldface type). When one follows the last paragraph of Section F.1.b. through from beginning to end without dreaming up a reference within it to underinsured motorist coverage—a reference that does not exist—it is evident that the trial court's ultimate construction of Section F.1.b. was and is the correct one.

VIII. If this court affirms the judgments concerning Plaintiff's entitlement to underinsured motorist benefits, it must also affirm the award of fees and costs entered below, and award her fees and costs associated with this appeal.

Tonya Hedges was awarded attorney fees and costs by the trial

court in the sum of $34,696.63 (CP 116.) That award was predicated on her having prevailed after a denial of insurance coverage. *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 711 P.2d 673 (1991). If this court affirms the judgment for Ms. Hedges concerning entitlement to UIM benefits, then it should also affirm the award of fees and costs entered below. *Lenzi v. Redland Ins. Co.*, 140 Wn.2d 267, 281-82, 996 P.2d 603 (2000) (court awarded *Olympic Steamship* fees on appeal).

In addition to affirming the order and judgment regarding *Olympic Steamship* fees at the trial court level, Tonya Hedges requests that this Court award her attorney fees and costs on appeal pursuant to RAP 18.1(a)-(b). *Olympic Steamship* fees are proper on appeal, again, as American Family has continued to compel Plaintiff to assume the burden of legal action to obtain the full benefit of her insurance contract. *See*, *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 69, 164 P.3d 454 (2007), citing *Olympic Steamship*, 117 Wn.2d at 53, 811 P.2d 673.

CONCLUSION

The test is not what sophisticated appellate jurists and well-educated insurance defense lawyers might glean that the language of an insurance policy was intended to say. The test is whether the average purchaser of insurance, the average person, can read the policy and

understand it. If the policy is ambiguous, they cannot, and the interpretation most favorable to the insured must be applied. That is the situation here. When read in conjunction with the policy as a whole, Section F.1.b., "the Other Liability Coverage From Other Sources" provision, is exactly what the trial court characterized it as—an ambiguous provision that as written fails to accomplish what American Family now contends it wanted it to do (prevent stacking of multiple UIM coverages), and the trial court properly construed it as such, and in favor of the insured. The trial court's rulings that, as a matter of law, American Family should not have denied UIM coverage to Tonya Hedges, and that she is entitled to her attorney fees and costs for having to enforce her right to coverage, should be affirmed. Ms. Hedges should also be awarded additional attorney fees and costs for having to enforce her right to coverage on appeal.

DATED this 20th day of June, 2014.

WILLIAM K. THAYER, WSBA 11286
of Attorneys for Respondent Tonya Hedges

SCOTT W. EDWARDS, WSBA 41111
of Attorneys for Respondent Tonya Hedges

APPENDIX A

RCW48.22.030

West's Revised Code of Washington Annotated
Title 48. Insurance (Refs & Annos)
Chapter 48.22. Casualty Insurance (Refs & Annos)

West's RCWA 48.22.030

48.22.030. Underinsured, hit-and-run, phantom vehicle coverage to be provided--Purpose--Definitions--Exceptions--Conditions--Deductibles--Information on motorcycle or motor-driven cycle coverage--Intended victims

Effective: July 26, 2009
Currentness

(1) "Underinsured motor vehicle" means a motor vehicle with respect to the ownership, maintenance, or use of which either no bodily injury or property damage liability bond or insurance policy applies at the time of an accident, or with respect to which the sum of the limits of liability under all bodily injury or property damage liability bonds and insurance policies applicable to a covered person after an accident is less than the applicable damages which the covered person is legally entitled to recover.

(2) No new policy or renewal of an existing policy insuring against loss resulting from liability imposed by law for bodily injury, death, or property damage, suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be issued with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of underinsured motor vehicles, hit-and-run motor vehicles, and phantom vehicles because of bodily injury, death, or property damage, resulting therefrom, except while operating or occupying a motorcycle or motor-driven cycle, and except while operating or occupying a motor vehicle owned or available for the regular use by the named insured or any family member, and which is not insured under the liability coverage of the policy. The coverage required to be offered under this chapter is not applicable to general liability policies, commonly known as umbrella policies, or other policies which apply only as excess to the insurance directly applicable to the vehicle insured.

(3) Except as to property damage, coverage required under subsection (2) of this section shall be in the same amount as the insured's third party liability coverage unless the insured rejects all or part of the coverage as provided in subsection (4) of this section. Coverage for property damage need only be issued in conjunction with coverage for bodily injury or death. Property damage coverage required under subsection (2) of this section shall mean physical damage to the insured motor vehicle unless the policy specifically provides coverage for the contents thereof or other forms of property damage.

(4) A named insured or spouse may reject, in writing, underinsured coverage for bodily injury or death, or property damage, and the requirements of subsections (2) and (3) of this section shall not apply. If a named insured or spouse has rejected underinsured coverage, such coverage shall not be included in any supplemental or renewal policy unless a named insured or spouse subsequently requests such coverage in writing. The requirement of a written rejection under this subsection shall apply only to the original issuance of policies issued after July 24, 1983, and not to any renewal or replacement policy. When a named insured or spouse chooses a property damage coverage that is less than the insured's third party liability coverage for property damage, a written rejection is not required.

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(5) The limit of liability under the policy coverage may be defined as the maximum limits of liability for all damages resulting from any one accident regardless of the number of covered persons, claims made, or vehicles or premiums shown on the policy, or premiums paid, or vehicles involved in an accident.

(6) The policy may provide that if an injured person has other similar insurance available to him or her under other policies, the total limits of liability of all coverages shall not exceed the higher of the applicable limits of the respective coverages.

(7)(a) The policy may provide for a deductible of not more than three hundred dollars for payment for property damage when the damage is caused by a hit-and-run driver or a phantom vehicle.

(b) In all other cases of underinsured property damage coverage, the policy may provide for a deductible of not more than one hundred dollars.

(8) For the purposes of this chapter, a "phantom vehicle" shall mean a motor vehicle which causes bodily injury, death, or property damage to an insured and has no physical contact with the insured or the vehicle which the insured is occupying at the time of the accident if:

(a) The facts of the accident can be corroborated by competent evidence other than the testimony of the insured or any person having an underinsured motorist claim resulting from the accident; and

(b) The accident has been reported to the appropriate law enforcement agency within seventy-two hours of the accident.

(9) An insurer who elects to write motorcycle or motor-driven cycle insurance in this state must provide information to prospective insureds about the coverage.

(10) An insurer who elects to write motorcycle or motor-driven cycle insurance in this state must provide an opportunity for named insureds, who have purchased liability coverage for a motorcycle or motor-driven cycle, to reject underinsured coverage for that motorcycle or motor-driven cycle in writing.

(11) If the covered person seeking underinsured motorist coverage under this section was the intended victim of the tort feasor, the incident must be reported to the appropriate law enforcement agency and the covered person must cooperate with any related law enforcement investigation.

(12) The purpose of this section is to protect innocent victims of motorists of underinsured motor vehicles. Covered persons are entitled to coverage without regard to whether an incident was intentionally caused. However, a person is not entitled to coverage if the insurer can demonstrate that the covered person intended to cause the event for which a claim is made under the coverage described in this section. As used in this section, and in the section of policies providing the underinsured motorist coverage described in this section, "accident" means an occurrence that is unexpected and unintended from the standpoint of the covered person.

(13) "Underinsured coverage," for the purposes of this section, means coverage for "underinsured motor vehicles," as defined in subsection (1) of this section.

Credits

[2009 c 549 § 7106, eff. July 26, 2009; 2007 c 80 § 14, eff. July 22, 2007. Prior: 2006 c 187 § 1, eff. June 7, 2006; 2006 c 110 § 1, eff. June 7, 2006; 2006 c 25 § 17, eff. June 7, 2006; 2004 c 90 § 1, eff. June 10, 2004; 1985 c 328 § 1; 1983 c 182 § 1; 1981 c 150 § 1; 1980 c 117 § 1; 1967 c 150 § 27.]

Notes of Decisions (491)

West's RCWA 48.22.030, WA ST 48.22.030
Current with 2014 Legislation effective on June 12, 2014, the General Effective Date for the 2014 Regular Session, and 2014 Legislation effective July 1, 2014

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APPENDIX B

GR 14.1

West's Revised Code of Washington Annotated
Part I Rules of General Application
General Rules (Gr)

General Rules, GR 14.1

RULE 14.1. CITATION TO UNPUBLISHED OPINIONS

Currentness

(a) Washington Court of Appeals. A party may not cite as an authority an unpublished opinion of the Court of Appeals. Unpublished opinions of the Court of Appeals are those opinions not published in the Washington Appellate Reports.

(b) Other Jurisdictions. A party may cite as an authority an opinion designated "unpublished," "not for publication," "non-precedential," "not precedent," or the like that has been issued by any court from a jurisdiction other than Washington state, only if citation to that opinion is permitted under the law of the jurisdiction of the issuing court. The party citing the opinion shall file and serve a copy of the opinion with the brief or other paper in which the opinion is cited.

Credits
[Adopted effective September 1, 2007.]

Notes of Decisions (2)

GR 14.1, WA R GEN GR 14.1
Current with amendments received through 5/1/14

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APPENDIX C

Fed. R. App. P. 32.1

United States Code Annotated
Federal Rules of Appellate Procedure (Refs & Annos)
Title VII. General Provisions

Federal Rules of Appellate Procedure Rule 32.1, 28 U.S.C.A.

Rule 32.1. Citing Judicial Dispositions

Currentness

(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:

(i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and

(ii) issued on or after January 1, 2007.

(b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

CREDIT(S)

(Added Apr. 12, 2006, eff. Dec. 1, 2006.)

ADVISORY COMMITTEE NOTES

2006 Adoption

Rule 32.1 is a new rule addressing the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated by a federal court as "unpublished," "not for publication," "non-precedential," "not precedent," or the like. This Committee Note will refer to these dispositions collectively as "unpublished" opinions.

Rule 32.1 is extremely limited. It does not require any court to issue an unpublished opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as "unpublished" or specify the procedure that a court must follow in making that determination. It says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court. Rule 32.1 addresses only the *citation* of federal judicial dispositions that have been *designated* as "unpublished" or "non-precedential" -- whether or not those dispositions have been published in some way or are precedential in some sense.

Subdivision (a). Every court of appeals has allowed unpublished opinions to be cited in some circumstances, such as to support a contention of issue preclusion or claim preclusion. But the circuits have differed dramatically with respect to the restrictions that they have placed on the citation of unpublished opinions for their persuasive value. Some circuits have freely permitted such citation, others have discouraged it but permitted it in limited circumstances, and still others have forbidden it altogether.

Rule 32.1(a) is intended to replace these inconsistent standards with one uniform rule. Under Rule 32.1(a), a court of appeals may not prohibit a party from citing an unpublished opinion of a federal court for its persuasive value or for any other reason. In addition, under Rule 32.1(a), a court may not place any restriction on the citation of such opinions. For example, a court may not instruct parties that the citation of unpublished opinions is discouraged, nor may a court forbid parties to cite unpublished opinions when a published opinion addresses the same issue.

Rule 32.1(a) applies only to unpublished opinions issued on or after January 1, 2007. The citation of unpublished opinions issued before January 1, 2007, will continue to be governed by the local rules of the circuits.

Subdivision (b). Under Rule 32.1(b), a party who cites an opinion of a federal court must provide a copy of that opinion to the court of appeals and to the other parties, unless that opinion is available in a publicly accessible electronic database -- such as a commercial database maintained by a legal research service or a database maintained by a court. A party who is required under Rule 32.1(b) to provide a copy of an opinion must file and serve the copy with the brief or other paper in which the opinion is cited. Rule 32.1(b) applies to all unpublished opinions, regardless of when they were issued.

Notes of Decisions (1)

F. R. A. P. Rule 32.1, 28 U.S.C.A., FRAP Rule 32.1
Amendments received to 5-15-14

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APPENDIX D

US Court of Appeals
8th Circuit
Local Rule 32.1A

United States Court of Appeals for the Eighth Circuit: Local Rules, October 1, 2010

Rule 32.1A: CITATION OF UNPUBLISHED OPINIONS

Unpublished opinions are decisions which a court designates for unpublished status. They are not precedent. Unpublished opinions issued on or after January 1, 2007, may be cited in accordance with FRAP 32.1. Unpublished opinions issued before January 1, 2007, generally should not be cited. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite an unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this court or another court would serve as well. A party citing an unpublished opinion in a document or for the first time at oral argument which is not available in a publically accessible electronic database must attach a copy thereof to the document or to the supplemental authority letter required by FRAP 28(j). When citing an unpublished opinion, a party must indicate the opinion's unpublished status.

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct. I hereby declare that I caused to be served a true copy of the within and foregoing document RESPONDENT'S BRIEF upon the following attorney(s) of record at the address(es) shown on the 20th day of June, 2014:

Scott T. Schauermann Hitt Hiller Monfils Williams LLP 411 SW 2nd Avenue, Suite 400 Portland, OR 97204-3408	☐U.S. Mail, First Class, Postage Paid ☐Vancouver Legal Messengers ☐Federal Express ☐FAX
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Linda Malattia

Date signed: 6-20-14

Place signed: 1700 East Fourth Plain Blvd. Vancouver, Washington

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